FILE COPY

FILED
JAN 22 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~529~~ 36

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER FRED T. MACKEY

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner, Fred T. Mackey

PETITION FOR CERTIORARI FILED AUGUST 29, 1969
CERTIORARI GRANTED DECEMBER 8, 1969

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provision and Statutes Involved 3

Statement 6

Summary of Argument 10

Argument 12

I.

Because Petitioner's Conviction Was Obtained Through The Use Of Involuntary And Coerced Admissions Of A Link In The Chain Of Evidence Needed To Prosecute And Convict, It Must Be Vacated And Set Aside And A New Trial Ordered 12

II.

The Decisions Of Marchetti And Grosso That The Coerced Filing Of The Wagering Tax Returns Violated Petitioner's Privilege Against Self-Incrimination Must Be Retroactively Applied 26

III.

Petitioner Did Not Waive A Known Privilege At Trial 30

Conclusion 33

List Of Authorities Cited

Cases:

Albertson v. Subservice Activities Control Board, 382 U.S. 70 ..... 17, 18
Blau v. United States, 340 U.S. 159 ..... 18, 19
Boyd v. United States, 116 U.S. 616 28
Bram v. United States, 168 U.S. 532 21
Brown v. Mississippi, 297 U.S. 278 26
Clewis v. Texas, 386 U.S. 707 24
Counselman v. Hitchcock, 142 U.S. 547 ..... 17, 18
Davis v. North Carolina, 384 U.S. 737 27
Desist v. United States, 394 U.S. 244 27
Garrity v. New Jersey, 385 U.S. 493 ..... 23, 24
Greenwald v. Wisconsin, 390 U.S. 519 24
Griffin v. California, 380 U.S. 609 (1965) 22, 24
Grosso v. United States, 390 U.S. 62 ..... 15, 16, 32
Harrison v. United States, 392 U.S. 219 18
Haynes v. Washington, 373 U.S. 503 ..... 24, 25
Hoffman v. United States, 341 U.S. 479 18
Holland v. United States, 348 U.S. 121 6
Jackson v. Denno, 378 U.S. 368 ..... 13, 28
Jenkins v. Delaware, 395 U.S. 213 27
Johnson v. Zerbst, 304 U.S. 458 30
Leary v. United States, 395 U.S. 6 31

Lewis v. United States, 348 U.S. 419 11

Linkletter v. Walker, 381 U.S. 618 27

Lisenba v. California, 314 U.S. 219 13

Malloy v. Hogan, 378 U.S. 5 (1964) 17, 21

Marchetti v. United States, 390 U.S. 39 ..... 15, 16

Mills v. Louisiana, 360 U.S. 230 21

Miranda v. Arizona, 384 U.S. 436 ..... 14, 15, 31

Murphy v. Waterfront Commissioners, 378 U.S. 52 18

Rogers v. California, 365 U.S. 534 13

Slochower v. Board of Education, 350 U.S. 551 23

Spano v. New York, 360 U.S. 315 ..... 13, 24, 25

Spevack v. Klein, 385 U.S. 511 23

Sullivan v. United States, 274 U.S. 259 ..... 13, 16

Tehan v. Shott, 382 U.S. 406 27

United States v. Coffey, 2 Cir., 198 F. 2d 438 (1952) 18

United States v. Costello, 2 Cir., 352 F. 2d 848 (1965) 24

United States v. Kahriger, 345 U.S. 22 11

United States v. Knox, No. 17, December 8, 1969, 38 L.W. 4016 ..... 19, 26

United States v. Lookretis, 7 Cir., 398 F. 2d 64 (1968) 19

United States v. Lucia, 5 Cir., 416 F. 2d 920 (1969) 29, 31

United States v. Meyers, 276 F. Supp. 748 (E.D., Pa., 1967) 32

United States v. Riccio, (N.D., Ill. 1968) 282 F. Supp. 979 15

United States v. Weisman, 2 Cir., 111 F. 2d 260 (1940) 18

Wood v. United States, D.C., Cir., 128 F. 2d 265 (1942) 30

Constitutional Provision and Statutes:

Fifth Amendment, United States Constitution 3, 12

8 Wigmore, Evidence 345 (McNaughten Rev. 1961) 20

26 U.S.C. Sects, 7201, 7202, 7203 ..... 3, 5, 6

28 U.S.C. Sect. 2255 ..... 3, 4

Treatises:

Caplin, The Gambling Business & Federal Taxes, 8 Crime & Delinquency, 371, 372, 377 16

Griswold, The Fifth Amendment Today, (Harvard Univ. Press, 1955) (p. 9) 14, 18, 19

Levy, Origins of the Fifth Amendment, (Oxford Univ. Press, 1968) (p. 432) 28, 29, 30

II Schwartz, Rights of The Person, 830 (MacMillan, 1968) 17

In The

Supreme Court of the United States

October Term, 1969

No. 529

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER FRED T. MACKEY

OPINION BELOW.

The opinion of the Court of Appeals (A. 47-55) is reported at 411 F. 2d 504. The memorandum opinion of the District Court is unreported (A. 27-38).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 4, 1969 (A. 46). The petition for a writ of certiorari was granted on December 8, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254 (1).

QUESTIONS PRESENTED.

1. Whether this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, which held that the filing of wagering excise tax returns violates a taxpayer's privilege against self-incrimination must be applied retroactively in a 28 U.S.C. Sect. 2255 proceeding to set aside a conviction for income tax evasion founded in part upon the admission in evidence of such wagering tax returns.

2. Whether a criminal income tax evasion conviction should be vacated and set aside and a new trial ordered, when this conviction is founded in part upon involuntary confessions of the illegal activity of gambling, and when such illegal activity is admittedly a link in the chain of evidence needed to prosecute and convict in the income tax evasion case.

3. Whether there ever is any justification in law or in fact for a court to refuse to vacate and set aside a criminal conviction after it has become final, when such criminal conviction was obtained in part upon involuntary and coerced statements which were a link in the chain of evidence needed to prosecute and convict.

4. Whether a failure to claim the privilege against self-incrimination at trial when wagering tax returns were offered in evidence, was a waiver of the privilege, where other objection to the admission of the exhibits was made, and where there was no indication or intimation either from the trial record, or the state of the law existing at that time, that the defendant deliberately and knowingly relinquished a known constitutional claim.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

1. The Fifth Amendment, United States Constitution.

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

2. The statute under which Petitioner was prosecuted for income tax evasion, though nothing turns on its terms, was Sect. 7201, I.R.C., 1954, which provided as follows:

> "§7201. *Attempt To Evade Or Defeat Tax*
>
> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by his title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with costs of prosecution."

3. The statute under which Petitioner sought post conviction relief was 28 U.S.C. Sect. 2255 which provides as follows:

> "§ 2255. *Federal Custody: Remedies On Motion Attacking Sentence*
>
> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right

to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

4. The statutes under which Petitioner could have been prosecuted for failure to file the wagering tax returns are 26 U.S.C. Sects. 7201, 7202, and 7203.

26 U.S.C. 7201 provides:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U.S.C. 7202 provides:

"Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U.S.C. 7203 provides:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under author-

ity of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

STATEMENT.

A. Course of proceedings in the underlying criminal trial and in the Sect. 2255 case now before this Court.

On January 21, 1964, Petitioner was found guilty by a jury of willful attempt to evade his income taxes on an indictment of five counts charging violations of 26 U.S.C. Sect. 7201 (I.R.C., 1954) for the years 1956 through 1960 (A. 2-3).[1]

The government proceeded on the net worth theory, i.e. no specific items of unreported income were shown by the government to establish its case.[2]

---

[1] Appellant's Appendix on appeal in the Court of Appeals for the 7th Circuit, and the briefs of the government and Petitioner in that case (*U. S.* v. *Mackey*, No. 14584) have been filed in this Court. Except insofar as they were printed in that Appendix, the government's exhibits admitted at the trial were returned to the government and cannot now be found either by Petitioner or the government. The one exception to this is the 15 representative Forms 730, Wagering Tax Returns which were admitted together with 45 additional Wagering Tax Returns (A. 30-34). The applicable portions of that Appendix have been included in the Appendix filed in this cause (A. 7-25; 40-45).

[2] See *Holland* v. *United States*, 348 U.S. 121.

As the District Court below which tried the criminal case noted in these Sect. 2255 proceedings (A. 27-28):

> "The Government presented its case on the net worth method—it attempted to show that the Petitioner's net worth increased during the subject period in an amount unaccounted for by his reported income and non-taxable sources. A crucial step in prosecuting a case under this method is the establishment of a probable source of the unreported income, in this case 'policy' or gambling. One type of proof offered to establish this probable source of unreported income were Government Exhibits 30 through 89, which were monthly gambling excise tax returns, Form 730, required to be filed by one who is subject to the excise tax on wagering. (Title 26 U.S.C. §4401, Treas. Reg. §44.4011 (a)-1(a)). These returns were objected to at the trial on the grounds that they were inflammatory, prejudicial, and irrelevant, but not on the ground that their admission violated the plaintiff's right against self-incrimination."

On March 24, 1964, the District Court entered judgment and Petitioner was sentenced to five years imprisonment on each count to run concurrently, and was fined $10,000.00 on each count. This judgment and sentence was affirmed by the Court of Appeals for the Seventh Circuit, *United States* v. *Mackey,* No. 14584, 345 F. 2d 499 (1965), and a petition to this Court for a writ of certiorari thereto was denied (382 U.S. 824). Petitioner was serving his sentence when the motion under Section 2255 was filed in the District Court. Petitioner is presently released on parole.

On February 12, 1968, Petitioner filed the motion in the case at bar under 28 U.S.C. 2255 to vacate and set aside his judgment of conviction (A. 2-6). No an-

swer thereto was required by the District Court or filed by the government. Briefs in support and opposition were filed by each of the parties. No hearing was held.

On August 13, 1968, the District Court entered its order denying the Motion under 28 U.S.C. Sect. 2255 (A. 26). On September 6, 1968, the District Court issued its Memorandum in support of this order (A. 27-38).

On October 16, 1968 the parties filed in the Court of Appeals a stipulation containing 15 representative copies of the 60 Form 730, Wagering Tax Returns which are in issue in this cause (A. 40-45).

B. Relevant facts concerning the underlying conviction for income tax evasion.

The relevant facts are contained in Petitioner's Motion under 28 U.S.C. Section 2255 (A. 2-6). During Petitioner's criminal trial in the District Court, the government offered as government's exhibits 30 thru 89 inclusive, sixty (60) monthly Form 730 wagering excise tax returns previously filed by Mackey pursuant to 28 U.S.C. Sect. 4401 and Treas. Reg. No. 44.6011 (a)-1(a), (A. 3, 7-14, 30-34). Petitioner objected to the admission of these returns on the grounds they were offered for the purpose of inflammatory prejudice and bias and for the purpose of getting something into evidence that the Government had otherwise not been able to do (A. 7, 11-12).

The District Court below characterized these exhibits as "somewhat inflammatory" (A. 10) but admitted the returns (A. 12). The Government then argued to the jury that these returns and the summary exhibit (ex. 765) based on these returns showed a likely source of unreported income (A. 16-18), and in the Court of Appeals on ap-

peal in the criminal case argued that the admission of these returns "constituted a part of the Government's case on the important issue of a likely source of unreported taxable income" (A. 4; and see p. 43 of government's brief in the Court of Appeals in *U. S.* v. *Mackey,* No. 14584). In addition, the government concedes this in this Court, and concedes that these returns also contained necessary evidence to provide a foundation for the summary exhibit 765 (Brief in opposition to Petition for Writ of Certiorari, p. 5; and see A. 3, para. 4; 7-16). The District Court below in disposing of Petitioner's motion under Sect. 2255 held that the establishment of a likely source of unreported income was a "crucial step" in prosecuting Petitioner (A. 27).

The trial lasted seven weeks. The jury deliberated five days, averaging more than twelve hours a day (Petitioner's Brief in the Court of Appeals in No. 14584, p. 3).

One important point needs noting here. The Court of Appeals below noted (A. 48) that upon the prior appeal, that Court stated: "Defendant concedes that he was a policy wheel operator during the years in question." This concession was made in briefs and argument in the Court of Appeals on appeal in the criminal case. Petitioner rested at the close of the government's case in the tax evasion trial. The only statement made to the jury by Petitioner's counsel about "policy" was in final argument to the jury in an effort to blunt the prejudicial effect of the admission of the wagering tax returns (Appellant's Appendix in No. 14584, Vol. IV, pp. 1908-1910).

SUMMARY OF ARGUMENT.

I.

This is a coerced confession case. Petitioner was compelled under fear of imprisonment and fines to file wagering tax returns which characterized him as a gambler, and which provided the government with information and figures relative to his gambling income. At the time Petitioner filed these returns, the government was actively using these returns to provide information and evidence in investigating and prosecuting gamblers both for crimes involving gambling and income tax evasion.

These returns admittedly provided an important and crucial link in the chain of evidence needed to prosecute and convict Petitioner. They provided the evidence used by the government to specifically show the jury a likely source of unreported income, and they provided the foundation to support the admissibility of the government's summary exhibit 765. This is conceded by the government, and the District Court below, in these Section 2255 proceedings. Thus, Petitioner's conviction, which is founded in part upon the admission of these involuntary and coerced wagering tax returns, must be vacated and set aside without regard to the truth or falsity of the admissions contained in the returns.

II.

The decisions of *Marchetti* and *Grosso* should be retroactively applied to Petitioner's conviction. Because Petitioner's conviction was obtained through the use of co-

erced and involuntary admissions, his trial was fundamentally unfair in a very real and substantial constitutional sense. This Court has repeatedly and always held that a conviction founded upon a coerced confession or admissions must be vacated and set aside and a new trial ordered.

III.

Petitioner did not waive the privilege of self-incrimination at trial. At the time of his trial, this Court's decisions in *United States* v. *Kahriger,* 345 U.S. 22 and *Lewis* v. *United States,* 348 U.S. 419 were viable and had upheld the statutory scheme for taxing wagers against the claim it violated a person's privilege against self-incrimination. Subsequent to Petitioner's trial, and after his conviction had become final, this Court overruled *Kahriger* and *Lewis* in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, and held that the interrelated, statutory scheme for taxing wagers, including the requirement of filing a wagering excise tax return, violated a person's privilege against self-incrimination. Thus, Petitioner had no privilege which he could waive at trial. He could not and did not intentionally relinquish or abandon a right which he did not have and which was unknowable.

ARGUMENT.

I.

BECAUSE PETITIONER'S CONVICTION WAS OBTAINED THROUGH THE USE OF INVOLUNTARY AND COERCED ADMISSIONS OF A LINK IN THE CHAIN OF EVIDENCE NEEDED TO PROSECUTE AND CONVICT, IT MUST BE VACATED AND SET ASIDE AND A NEW TRIAL ORDERED.

a. Introduction.

The Court of Appeals below affirmed the District Court's denial of Petitioner's motion for a new trial upon the following grounds:

1. Petitioner waived the privilege against self incrimination at trial (A. 49-50).
2. This Court's decisions in *Marchetti-Grosso* are not to be retroactively applied to Petitioner (A. 50-55).
3. The wagering tax returns were not coerced from Petitioner, and the admissions contained therein were true (A. 53).
4. The statutory requirement to file wagering tax returns was impersonal and directed to the public at large (A. 53-54).

The Fifth Amendment literally says that "No person . . . shall be compelled in any criminal case to be a witness against himself." Although Petitioner rested at the close of the government's case in the tax evasion trial, he was compelled to be a witness against himself as if he had been compelled to take the stand and testify that "yes, I am a gambler and have a likely source of unreported income."; and "these are figures relative to my

income from gambling" in order that the government would have a proper foundation for the admission of a summary exhibit. As much as the reasoned opinion from case or authority, the plain language of the Amendment requires a vacation of Petitioner's conviction and a new trial.

The case at bar is not a complex one. It is bottomed upon the mandate of this Court in *Jackson* v. *Denno,* 378 U.S. 368, at p. 376:

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers* v. *Richmond,* 365 U.S. 534, and even though there is ample evidence aside from the confession to support the conviction. *Malinski* v. *New York,* 324 U.S. 401; *Stroble* v. *California,* 343 U.S. 181; *Payne* v. *Arkansas,* 356 U.S. 560."

Compare: *Rogers* v. *California,* 365 U.S. 534, 541; *Lisenba* v. *California,* 314 U.S. 219; *Spano* v. *New York,* 360 U.S. 315.

Each word of this rule is pregnant with meaning to the case at bar. Petitioner's conviction was founded in part upon his coerced and involuntary admissions. The decisions of both Courts below erroneously deemed this not to rise to constitutional significance because the admissions were true and were voluntarily given (A. 42; 21-22). In addition, the Court of Appeals seems to hold (A. 43) that *Sullivan* v. *United States,* 274 U.S. 259 is controlling because the requirement of filing wagering tax returns was directed to the public at large. This is also error in the light of *Marchetti* and *Grosso.*

"We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times"; *Miranda* v. *Arizona*, 384 U.S. 436, 458. There, this Court brought into historical fulfillment the full scope of the privilege. In so doing, this Court repeated that the privilege's foundation "is the respect a government—state or federal—must accord to the dignity and integrity of its citizens", so that "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth"; *Miranda*, at p. 460.

Dean Griswold in his *The Fifth Amendment Today*, (Harvard Univ. Press, 1955) defined the privilege as follows (p. 9):

> "I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized. As I have already pointed out, the establishment of the privilege is closely linked historically with the abolition of torture. Now we look upon torture with abhorrence. But torture was once used by honest and conscientious public servants as a means of obtaining information about crimes which could not otherwise be disclosed. We want none of that today, I am sure. For a very similar reason, we do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being."

It is, then, that sense of civility that a mature nation has which gives life and meaning to the privilege against self-incrimination, by raising it as a shield to protect a person against a conviction based on evidence coerced from him. Yet, Petitioner at bar was in fact convicted on testimony wrung from his own mouth under coercion. The privilege must be used in the case at bar as a sword to vacate Petitioner's conviction in order to afford him a trial free from the taint of evidence taken from him by the government in violation of the privilege.

b. This Court has specifically held that the Wagering Tax Statutes were directed at gamblers for the purpose of investigating and prosecuting gamblers.

Miranda v. *Arizona,* 384 U.S. 436 clearly foreshadowed *Marchetti* and *Grosso.* In *Marchetti* and *Grosso,* this Court declined to directly challenge the Congressional intent in enacting a taxing scheme whose major purpose was to secure criminal prosecutions of gamblers both at the state and local level.[3] Instead, it rendered these statutes impotent by holding that if a person were prosecuted for failing to comply with them, the privilege against self-incrimination would bar prosecution. The reason for this appears clear. The statutory scheme was designed to and did in fact coerce confessions of illegal activity from gamblers in order to provide federal and local law enforcement officers with investigatory leads and/or evidence to be used in prosecuting gamblers. *Marchetti* and *Grosso* are permeated with this reasoning, and with the fact that gamblers face "real and appreciable" hazards of providing a "link in the chain of evi-

[3] See the "straight face" statement of Judge Napoli in *United States* v. *Riccio,* (N.D., Ill. 1968) 282 F. Supp. 979, 981.

dence" tending to establish guilt when they complied w
the statutes; *Marchetti*, 390 U.S. at p. 66-67. This w
further emphasized by Mr. Justice Brennan concurri
in *Grosso* where he stated (390 U.S. at p. 73):

> "On the other hand, we know that where the go
> ernment scheme clearly evidences the purpose
> gathering information from citizens in order to secu
> their conviction of crime it contravenes the pri
> lege."

Moreover, in *Marchetti*, this Court noted that Commi
sioner Caplin stated that the I.R.S. was in "full cooper
tion" with the Attorney General to collect the taxes d
on gambling and suppress organized gambling, 390 U.S.
p. 48, referring to Caplin, *The Gambling Business & Fe
eral Taxes*, 8 Crime & Delinquency, 371, 372, 377. In add
tion, Commissioner Caplin made the following comme
in that article (p. 378):

> "Overall, the Intelligence Division investigations
> wagering tax evasion are becoming more effectiv
> . . . Further, our emphasis on significant violato
> has resulted in the convictions of increasing numbe
> of major bookmakers on charges of evasion of wage
> ing taxes *or income taxes* or both. (emphasis sup
> plied)

Hence, the decision of the Court of Appeals below tha
the Wagering Tax Statutes were directed at the publ
at large and that *Sullivan* v. *United States*, 274 U.S. 2
is controlling is clearly erroneous in the light of th
Court's decisions in *Marchetti* and *Grosso*.

c. The Wagering Tax Returns provided a link in the chain of evidence needed to investigate, prosecute and convict Petitioner.

It is true that the wagering tax returns were not used at a trial in which Petitioner was prosecuted for violation of a gambling statute. Rather, they were admitted for the purpose of showing a likely source of unreported gambling income in a prosecution for income tax evasion built upon the net worth theory, and for laying the foundation for the admission of the government's summary exhibit. It was this evidence which furnished the basis for the government's contention, obviously accepted by the jury, that the accused had substantial unreported income from gambling for which he had not paid the required taxes. Were it not for that evidence, the prosecution could not have succeeded in establishing and specifically showing to the jury the source of the difference between the income, including gambling income, reported by defendant in his income tax returns, and the additional gambling income which he allegedly had acquired. Hence, the information furnished by the accused in his wagering tax returns was a vital and indispensable link in the chain of evidence used by the government to prove its case, leading to the conviction of the Petitioner.

It is a well established principle of law that the Fifth Amendment covers both those facts which are a link in the chain of evidence necessary to prove a crime; and those facts which may only be *clues* to the discovery of other facts which in turn would tend to incriminate. II Schwartz, *Rights of The Person*, 830 (MacMillan, 1968); *Counselman* v. *Hitchcock*, 142 U.S. 547, 564, 565, 585; *Malloy* v. *Hogan*, 378 U.S. 1, 11-13; *Albertson* v. *SACB*,

382 U.S. 70, 80; *Murphy* v. *Waterfront Commissioners*, 378 U.S. 52, 79; cf. *Harrison* v. *United States*, 392 U.S. 219. In other words, the privilege against self-incrimination includes not only those facts which provide a link in the chain of evidence necessary to convict; but it also includes facts which can lead to a link to be used against the individual; *Counselman* v. *Hitchcock*, supra; *Blau* v. *United States*, 340 U.S. 159, 161; *Hoffman* v. *United States*, 341 U.S. 479, 486; *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 78, 80; *United States* v. *Coffey*, 2 Cir., 198 F. 2d 438 (1952). As was aptly stated by Judge Learned Hand in *United States* v. *Weisman*, 2 Cir., 111 F. 2d 260, 262 (1940):

> "All crimes are composed of definite elements, and nobody supposes that the privilege is confined to answers which directly admit one of those; it covers also such as logically, though mediately, lead to any one of them; such as are rungs of the rational ladder by which they may be reached. A witness would, for example, be privileged from answering whether he left his home with a burglar's jimmy in his pocket, though that is no part of the crime of burglary."

Here too, the wagering tax returns were "rungs of the rational ladder'" by which evidence of the alleged crime of income tax evasion was reached. If membership in the Communist Party presents sufficient threat of prosecution to support a claim of privilege, then, Petitioner, a gambler, surely had the privilege against "inquiry in an area permeated with criminal statutes where response to any of the form's questions in context might involve [him] in the admission of a crucial element of a crime"; *Albertson* v. *SACB*, 382 U.S. 78, 77-79.

Dean Griswold again illuminates this facet of the case at bar. He postulates the example of a person called

before a Congressional Committee and asked a question touching upon his past membership in the Communist Party. He notes that past membership in the Communist Party is not a crime in itself, but that persons have been prosecuted under the Smith Act for membership in the Communist Party plus something else. He therefore concludes that although the answer to the question admits of no crime, it will definitely incriminate him, and that, therefore, the privilege against self-incrimination is available and can be claimed; Griswold, op. cit., at p. 15 and 16; cf. *Blau* v. *United States,* 340 U.S. 159.

In fact, in a recent case, the Court of Appeals for the 7th Circuit agreed with the argument now being made by Petitioner in this Court. In *United States* v. *Lookretis,* 7 Cir., 398 F. 2d 64 (1968), that Court reversed a conviction of using an interstate facility in aid of unlawful gambling activity upon the authority of *Marchetti* and *Grosso* after remand from this Court. And this Court very recently noted with approval that the Court of Appeals in *Lookretis,* "ruled that *truthful* disclosures made under the compulsion of Sect. 4412 could not be introduced against their maker in a criminal proceeding"; *United States* v. *Knox,* No. 17, December 8, 1969, 38 L.W. 4016, 4017. It is important to note both that the conviction in *Lookretis* was not for the specific crime of gambling, but for a federal crime related to gambling, and in commenting thereon, this Court stated that "[h]owever, the Fifth Amendment was offended in *Lookretis,* precisely because the defendant *had* succumbed to the statutory compulsion by furnishing the requested incriminating information; 38 L.W. at p. 4017.

In the case at bar, the linkage between the information required to be given and its use in a criminal prose-

cution for evasion of taxes on income from gambling is abundantly clear and hardly remote or incredible. In fact, this linkage is admitted by the government. The information elicited in the returns admits one crime, gambling, and provided a logical "link in the chain" of evidence needed to convict Petitioner of another, evasion of taxes on income obtained from that gambling.

d. The Wagering Tax Returns were filed involuntarily and under a coercion recognized by the privilege against self-incrimination.

In ascertaining and evaluating the relation of the Fifth Amendment vis-a-vis the wagering tax returns, it must be remembered that these returns were filed by Petitioner because of the threat of imprisonment which faced him if he failed to do so. We think it obvious that *Marchetti-Grosso* clearly recognized this coercion aspect of the wagering tax statutes. Many years ago, Professor Wigmore said (8 Wigmore, Evidence 345 (McNaughten Rev. 1961)):

> "The policy of the privilege is to regulate a particular government—governed relation—first, to help prevent inhumane treatment of persons from whom information is desired and, second, to satisfy popular sentiment that, when powerful and impersonal government arrays its forces against solitary governed, it would be a violation of the individual's 'sovereignty' and less than fair for the government to be permitted to conscript the knowledge of the governed to its aid."

The case at bar is a clear instance in which the government was permitted to conscript the knowledge of the Petitioner to its aid and to bring about his conviction. As repeatedly stated, had it not been for the produc-

tion and admission into evidence of the wagering tax returns made out by Petitioner, admittedly crucial to the government's case, the crime of income tax evasion could not have been proved. These tax returns were filed by the Petitioner because the law compelled him to do so under the threat of punishment and imprisonment. These returns did not constitute voluntary actions, but represented typical examples of acts in which the individual yielded to the powerful threat of the government. Such evidence, produced under duress, and exacted from the individual under the threat of imprisonment and fines, is clearly a form of coerced confession and its use was in contravention of the privilege against self-incrimination.

The coercion aspect of a confession, of course, goes to the heart of the Fifth Amendment. Long ago, the Supreme Court in *Bram* v. *United States,* 168 U.S. 532, 543 speaking through Mr. Justice White, declared: "[T]he generic language of the amendment was but a crystallization of the doctrine as to confessions, well-settled when the amendment was adopted . . ." Hence, the prohibition against coerced confessions constitutes the touchstone of the Fifth Amendment; it "assures that no incriminating information adduced from a defendant involuntarily by anyone, anywhere, may be admitted into evidence against him"; *Mills* v. *Louisiana,* 360 U.S. 230, 238 (Douglas, J., dissenting).

This Court has upheld throughout the years the privilege as a protection against coerced confessions in any shape or form. Thus, in *Malloy* v. *Hogan,* 378 U.S. 5, 7, it repeated with approval the language of *Bram* v. *United States, supra,* that: "In criminal trials, in the courts of the United States wherever a question arises

whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that "no person shall be compelled in any criminal case to be a witness against himself."

It is true that the typical cases of coerced confessions involve physical or mental compulsion used by the government while the accused is in custody of the police. However, it is sophistry to draw subtle distinctions between confessions coerced by the application of physical force or psychological pressure, and confessions exacted by the use of threatened fine and imprisonment; or to put it in another way, between in-custody coercion and coercion by the government from without.

The threat of imprisonment has always been considered a coercive device in eliciting evidence to be used against the accused in criminal proceedings. As Mr. Justice Stewart stated in his dissent in *Griffin* v. *California,* 380 U.S. 609, 620 (1965):

> "*Compulsion is the focus of the inquiry.* . . . When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced." (emphasis supplied)

In the case at bar, too, the threat of fines and imprisonment for failure to file the wagering tax returns was like a brooding omnipresence in the sky. Utilization

of such coerced evidence in a subsequent related criminal trial was clearly in violation of the basic rights guaranteed to Petitioner by the Fifth Amendment.

The coercive force utilized in the case at bar was indeed far more effective and virulent than the force used in *Garrity* v. *New Jersey*, 385 U.S. 493; *Spevack* v. *Klein*, 385 U.S. 511, and *Slochower* v. *Board of Education*, 350 U.S. 551. In *Garrity*, the Court considered statements coerced because they were given by Police officers under the threat of loss of their positions if they refused to answer the questions submitted to them. In *Spevack* a lawyer's refusal to produce demanded financial records and to testify at a disbarment proceeding, which refusal led to his disbarment, was found to be protected by the privilege against self-incrimination. In *Slochower*, the Court held that a teacher could not be discharged merely because he had invoked the Fifth Amendment before a Congressional Committee, for that sanction would violate the privilege.

If the prospect of the loss of a job constitutes sufficient coercion to violate the privilege against self-incrimination, how much more is this true if the threatened loss of liberty looms on the horizon for the failure to furnish the required forms? As Mr. Justice Douglas stated in *Garrity*, 385 U.S. at 496:

> "The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under *Chambers* v. *Florida*, 309 U.S. 227, and related cases can be 'mental as well as physical'; 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn* v. *Alabama*, 361 U.S. 199, 206. Subtle pressures (*Leyra* v. *Denno*, 347 U.S. 556; *Haynes* v. *Washington*, 373 U.S. 503) may be as telling as

> coarse and vulgar ones. The question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.' *Lisenba* v. *California*, 314 U.S. 219, 241."

And he further stated at pp. 497-498:

> "The choice given petitioners was either to forfeit the jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda* v. *Arizona*, 384 U.S. 436, 464-465 is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions."

The thrust of the three decisions cited above, as well as *Griffin* v. *California*, 380 U.S. 609 is that the Fifth Amendment protects against coercion of incriminating facts from the defendant, and that coercion is found if the assertion of the privilege will subject the accused to a penalty or prove "costly." It is readily apparent that failure to file the wagering tax returns would clearly prove costly to the defendant, by subjecting him to the very real threat of prosecution by the federal government for failure to file; see, e.g. *United States* v. *Costello*, 2 Cir., 352 F. 2d 848 (1965).

Furthermore, the threat of fines or imprisonment was surely as coercive on Petitioner's confession of incriminating facts as the conduct in the typical coerced confession cases of *Greenwald* v. *Wisconsin*, 390 U.S. 519; *Haynes* v. *Washington*, 373 U.S. 503; *Spano* v. *New York*, 360 U.S. 315; or *Clewis* v. *Texas*, 386 U.S. 707.

In *Greenwald,* no physical abuse was alleged, nor any other form of mental or psychological coercion. The accused had not been allowed to see anyone or informed of his rights. This Court found that his confession was *involuntary* without application of the *Miranda* decision. The case is important in showing the liberalization of the concept of involuntary confessions, since there was no physical, mental or psychological pressure, no showing that the defendant had asked for his medicine and been denied it, no showing that he had either asked for food or been told that he would not receive any until he confessed, and the actual questioning time was only three and one-half hours.

In *Haynes,* "a pre-*Miranda* case, this Court found that the confession was obtained in an atmosphere of substantial coercion and inducement, and the totality of circumstances evidenced an involuntary written admission of guilt. Surely, the threat of imprisonment hanging over Petitioner was as strong a compulsion to supply information as the refusal to let the accused in *Haynes* call his wife until he did.

In *Spano,* the compulsion was found from being held eight hours, with no ability to see a lawyer, and with a friend being used to play on the accused's sympathy. In *Clewis,* the compulsion was found from being held over a long period of time, with intermittent questioning, but no physical or mental abuse.

In contrast, while Petitioner in the case at bar was not in custody at the time he confessed, he was faced with almost certain prosecution and, if convicted, imprisonment and fines for the federal offenses of failing to register and failing to pay the taxes involved. It seems

obvious that the in-custody coercion found to vitiate a confession in *Greenwald, Haynes, Spano* and *Clewis,* was far less than the out of custody coercion exerted on Petitioner to secure the admissions used against him at his trial. And, as noted previously, the fact that the wagering tax returns were truthful does not remove them from the protection against their use at trial afforded by the privilege, *United States* v. *Knox,* No. 17, December 8th, 1969, 38 LW 4016, 4017.

Thus, it is respectfully submitted that the conclusion of the Court of Appeals below, that the Fifth Amendment has no application to the case at bar because Petitioner's will was not overborne by physical coercion to lead him to a false admission is most certainly erroneous.

II.

THE DECISIONS OF MARCHETTI AND GROSSO THAT THE COERCED FILING OF THE WAGERING TAX RETURNS VIOLATED PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION MUST BE RETROACTIVELY APPLIED.

It has been previously pointed out that the admission of the wagering tax returns amounted to the use of a coerced confession at the criminal trial. That being so, the decisions of this Court in *Marchetti* and *Grosso* which recognized this fact must be retroactively applied to Petitioner's trial and his conviction therein must be vacated and set aside. For example, in *Brown* v. *Mississippi,* 297 U.S. 278, this Court held that persons who had confessions wrung from them under coercion were entitled to a new trial. It could be hardly argued by any State in this Court that prisoners serving sentences, at the time of *Brown,* under convictions obtained under similar

circumstances, could not avail themselves of the decision in *Brown* for the purpose of obtaining a new trial.

This Court has persistently and continually held to this principle without exception. Thus, in *Davis* v. *North Carolina*, 384 U.S. 737, which is a collateral attack upon a criminal conviction, this Court held that the non-retroactivity of other of its decisions "does not affect the duty of courts to consider claims that a statement was taken under circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo* v. *Illinois*, 378 U.S. 478" (at p. 740); and see *Jackson* v. *Denno*, 378 U.S. 368 which is another collateral relief case involving a coerced confession.

This principle was reiterated as recently as June 2, 1969 in *Jenkins* v. *Delaware*, 395 U.S. 213. There, this Court, in holding that *Miranda* would not be applied retroactively in the case before it, stated (at p. 221):

> "As we pointed out in *Johnson*, an individual who cannot claim the benefits of *Miranda* may still resort to whatever state and federal procedures are available to insure that statements admitted against him were made voluntarily. Moreover, he may invoke a 'substantive test of voluntariness which, has become increasingly meticulous . . . ."

Further, this Court has on other occasions stated that its decisions would be given retroactive effect where there is a likelihood of coercion present; *Linkletter* v. *Walker*, 381 U.S. 618, 638-639; *Desist* v. *United States*, 394 U.S. 244, 250; or where there has been a wrongful use of a coerced confession; *Tehan* v. *Shott*, 382 U.S. 406, 416.

Thus, under the clear decisions of this Court, Petitioner's conviction must be set aside because it is based

in part upon a coerced confession. This conviction is grossly tainted by evidence obtained through a violation of what is possibly the most ancient and important protection against government afforded to the citizen in the Bill of Rights. That is not to say that the admission of these gambling returns did not also affect the reliability or the integrity of the criminal trial. They did, for who can say whether a jury out for five twelve hour days convicted Petitioner of income tax evasion or, after staring at that stack of 60 forms for that period of time, for being a gambler, cf. *Jackson* v. *Denno*, 378 U.S. 368, 388-389.

But what is most important is that although Petitioner is on appeal in this Court, the privilege against self-incrimination is on trial here. And this privilege is one that has been literally won by the blood of martyrs; see Levy, *Origins of the Fifth Amendment*, (Oxford Univ. Press, 1968). We seriously question whether the government can come forward with a case which has upheld a conviction based upon a coerced confession or admission. To decide in such a way would be to open the door to a host of decisions in criminal trials in which the courts would weigh the truth or falsity of the confession, or would decide whether there was sufficient evidence other than the confession to justify both its admission and the conviction. It would well be then, as this Court stated in *Boyd* v. *United States*, 116 U.S. 616 at p. 635, that such decisions would be an "obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

This Court has rigidly respected the shield the Fifth Amendment provides against the use of a coerced confession at trial. The Court of Appeals for the 5th Circuit recognized this in the recent case of *United States* v. *Lucia,* 5 Cir., 416 F. 2d 920, where it vacated a conviction under the retroactively applied authority of *Marchetti* and *Grosso* and stated (p. 925):

> "The purpose of the *Marchetti-Grosso* rule is to protect the constitutional privilege against a statutory system jeopardizing it. The purpose is not to deter unlawful police action. Nor is it to sharpen the fact-finding process. It does not involve guilt or innocence. Indeed, 'The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; * * *.' *Marchetti,* 309 U.S. at 51, 88 S. Ct. at 704. The Supreme Court concluded that the objective of the statute—to force disclosure by punishing silence—was improper. Since the aim of the statute is constitutionally impermissible, courts should not continue to enforce its sanctions. Stated in terms of balancing *Stovall* factors, we consider the preservation of the Fifth Amendment privilege against self-incrimination more important than the fact that the government relied on earlier—now overruled—decisions."

Leonard Levy in his recent *Origins of the Fifth Amendment* (Oxford Univ. Press, 1968), ended this treatise with the following observation (p. 432):

> "*The framers of the Bill of Rights* saw their injunction, that no man should be a witness against himself in a criminal case, as a central feature of the accusatory system of criminal justice. While deeply committed to perpetrating a system that minimized the possibilities of convicting the innocent, they were not less concerned about the humanity that the fundamental law should show even to the offender. *Above*

> *all,* the Fifth Amendment reflected *their* judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty." (emphasis supplied)

We doubt that the judgment of the framers of the Bill of Rights needs disturbing in these times. We believe their judgment requires a new trial in the case at bar. To put it most forcefully concerning this privilege, "[w]ith world events running as they have been, there is special reason at this time for no relaxing the old personal freedoms won, as this one was, through centuries of struggles. . . . There is in it the wisdom of centuries, if not that of decades." *Wood* v. *United States,* D.C., Cir., 128 F. 2d 265, 278-279 (1942) (per Wiley Rutledge, A.J.).

III.

PETITIONER DID NOT WAIVE A KNOWN PRIVILEGE AT TRIAL.

Petitioner did not claim the privilege against self-incrimination at trial because he did not have the privilege available at his trial. This trial occurred during the reign of *Kahriger-Lewis,* and the conviction had become final before *Marchetti-Grosso* was handed down. Petitioner did object to the admission of the wagering tax returns on the grounds they were prejudicial.

The accepted definition of waiver defined by this Court in *Johnson* v. *Zerbst,* 304 U.S. 458 is "an intentional relinquishment or abandonment of a known right or privilege"; at p. 464.

In the recent case of *United States* v. *Lucia*, 5 Cir., 416 F. 2d 920 (1969), the defendant had pleaded guilty to an indictment charging him with failure to file wagering tax returns. After serving his sentence, and after *Marchetti-Grosso*, he sought post conviction relief much the same as Petitioner did here which was denied. The government raised the issue of waiver of the privilege as it does here. The Court of Appeals held there was not and could be no waiver of the privilege (p. 922):

> "Lucia had no knowledge of his right against self-incrimination under the *Grosso* and *Marchetti* rule for, at the time, those cases had not been decided. In earlier cases, *United States* v. *Kahriger*, 1953, 345 U.S. 22, 73 S. Ct. 510, 98 L. Ed. 754, and *Lewis* v. *United States*, 1955, 348 U.S. 419, 75 S. Ct. 415, 99 L. Ed. 475, the Supreme Court had rejected the contention that the prosecution under the federal gambling tax scheme violates the Fifth Amendment. Lucia, therefore, could not have 'knowingly and intentionally' waived his privilege against prosecution: that privilege did not exist. *Johnson* v. *Zerbst* and *Miranda* v. *Arizona* invalidate the waiver of rights that the defendant's own inexperience or ignorance prevent him from knowing. By logical extension, these decisions rule out all the more strongly the waiver of a right, such as Lucia's that is unknown not because of any infirmity on the defendant's part, but because it is unknowable."

In *Leary* v. *United States*, 395 U.S. 6, 27-28 this Court held that a failure to assert the privilege at trial was not a waiver of the privilege because, "Petitioner's trial occurred before our decisions in *Marchetti*, *Grosso* and *Haynes*. . . ." (p. 27)

In *Miranda* v. *Arizona*, 384 U.S. 436, this Court noted that a failure to object to the confession at trial was not

a waiver and did not preclude its consideration by this Court since the trial was held prior to *Escobedo* and its decision that day; 384 U.S. at p. 495, fn. 69.

In *Grosso,* this Court noted that a failure to claim the privilege was not a waiver because of the prior decisions of *Kahriger* and *Lewis;* 390 U.S. at p. 70-71.

In fact, as the court in *Lucia* notes, several lower courts in post *Marchetti-Grosso* cases have rejected the argument that failure to claim the privilege with respect to wagering tax returns constituted a waiver of the privilege; 416 F. 2d at p. 923-924 and cases cited therein. The Court further notes that although these cases were all direct appeals cases, their rationale was applicable to *Lucia,* and, of course, is equally applicable here.

The rule laid down in the above cited cases simply makes sense. If waiver is abandonment of a known right, then one simply cannot abandon the unknowable. To put it in another way, in order to waive a constitutional right at trial, there must be a deliberate design, or a strategic trial choice, to forego a known constitutional claim; *United States* v. *Meyers,* 276 F. Supp. 748 (E.D., Pa., 1967). It certainly cannot be argued that Petitioner or his counsel deliberately allowed these Forms 730 in evidence as a deliberate design or a strategic trial choice. Their admission was vigorously objected to on the grounds they would prejudice the jury. Given the state of the law as laid down in *Kahriger* and *Lewis,* which was applicable at the time of Petitioner's trial, this was the only reasonable and known objection that could be made to their admission at that time. Thus, there was no waiver of a known constitutional right at Petitioner's trial.

CONCLUSION.

For the reasons hereinabove stated, the Judgment of the Court of Appeals for the Seventh Circuit affirming the order of the United States District Court for the Northern District of Indiana should be reversed, and this cause should be remanded to the United States District Court for the Northern District of Indiana with directions to vacate and set aside its order denying Petitioner's motion for relief under 28 U.S.C. Section 2255 and to enter its order granting Petitioner a new trial.

Respectfully submitted,

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey